Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States

OCTOBER TERM, 1997

SUZANNE ROSMAN, ET AL,
PETITIONER

V.

GULF INDUSTRIES, INC., ET AL
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
OF SUPREME COURT STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Louisiana Revised Statute 13:3105 which allows Orleans Parish an exception to treat litigants differently from any other parish violates the Equal Protection Clause of the 14th Amendment of the United States Constitution?

2. Whether the language of LSA - R.S. 13:3105 "prior to commencement of trial" is vague and ambiguous in that it creates a constitutional violation in light of Louisiana Civil Code of Procedure Article 1734.1 which shuts off payment thirty (30) days before trial.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties in the courts below: Barriere Construction Company, Inc. and State of Louisiana Department of Transportation and Development.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SUZANNE ROSMAN, ET AL,
PETITIONER

V.

GULF INDUSTRIES, INC., ET AL
RESPONDENTS

PETITION

Suzanne Rosman, et al petitions for a writ of certiorari to review the judgment and opinion of the Louisiana Supreme Court on December 12, 1997.

OPINIONS BELOW

The Opinion of the Louisiana Supreme Court (97-C-2421 Pet App.1a) is not reported. The Opinion of the Fourth Circuit Court of Appeals is not reported. (96-CA-2610 Pet. App. 2a) The Opinion of the Fourth Circuit Court of Appeals on Application for Rehearing is not reported. (96-CA-2610, Pet. App. 3a). The Opinion of the district court (89-15699 Pet. App. 4a) is not reported.

JURISDICTION

The judgment of the court of the Louisiana Supreme Court was entered on December 12, 1997. The jurisdiction

of this Court is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the 14th Amendment to the United States Constitution provides, in part, as follows:

Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The rules authorizing jury trial must be uniform throughout any state in order for its citizens to have their right to a jury trial. One parish (county) out of sixty-four (64) has rules different for the others. These rules (however erroneously applied) must be stricken as contrary to due process and equal protection.

Petitioner, Suzanne Rosman, on her own behalf and on behalf of her children, Megan, Catherine and Scott, filed an action in the Civil District Court for the Parish of Orleans on the 17th of April, 1990. Petitioners sought recovery for the death of Sam Rosman. Mr. Rosman suffered fatal injuries in a collision with a construction truck that was performing work on an interstate highway exit in New Orleans, Louisiana. Petitioners claimed that defendants were liable for the death of Mr. Rosman due to its duty to protect him from hazards that it had created. They further claimed that the skull injury and subsequent death of Mr. Rosman would not have occurred but for the type of vehicle used as a shadow

vehicle to the highway operation.

The trial of this matter was scheduled to begin on April 12, 1995. On the first day of trial a jury was chosen and impaneled. The jury was released for the day due to maintenance problems in the building. On the morning of the second day, prior to witness testimony, petitioner moved to strike the Jury, alleging that the defendant had not paid its costs prior to the commencement of trial. The Honorable Judge Michael A. Bagneris denied this motion. After opening statements and two witnesses were called, the trial judge allowed the defendants to pay the costs. Writs were taken to the Fourth Circuit, which affirmed the trial court's decision.

The case proceeded to trial wth a jury panel and continued through April 23, 1996. A verdict was returned for the defendant and against petitoner on April 23, 1996 dismissing petitioner's complaint. (Pet. App. 4a). The judgment was signed on April 25, 1996. On May 6, 1996, Petitioner filed a motion for new trial. The motion was denied on May 8, 1996.

Petitioner filed a timely appeal to the Fourth Circuit Court of Appeals. On May 21, 1997, the Fourth Circuit entered a ruling affirming the lower court's decisions. (Pet. App. 3a) On August 29, 1997, the Fourth Circuit modified and affirmed its jury trial decision and denied the application for rehearing in all other respects. (Pet. App. 2a) An application for writs to the Supreme Court of the State of Louisiana was filed on September 29, 1997. In a decision rendered December 12, 1997, the writ application was denied. (Pet. App. 1a)

The main issue of this writ is whether the R.S. 13:3105, the only exception to LSA-C.C.P. Article 1734.1, is unconstitutional. This issue became ripe at the Louisiana Supreme Court level subsequent to the Fourth Circuit's ruling on rehearing. The courts below did not address the issue.

REASONS FOR GRANTING THE PETITION

The Louisiana Supreme Court, in denying Petitoner's writ application, has let stand a serious constitutional violation expressly in conflict with the Fourteenth Amendment. By refusing to grant petitioners' writ application, the Louisiana Supreme Court upheld the appellate court's rationale on rehearing without reviewing the constitutionality of LSA-R.S. 13:3105. That determination is contrary to the Fourteenth Amendment to the United States Constitution. There is no basis in the constitution, legislation or in jurisprudence to allow a legislature to adopt a statute which treats similarly situated litigants in a given state differently solely on the basis of the parish where the litigant resides. The Court of Appeals raised this issue on rehearing sua sponte without so much as a brief for either party. Accordingly, a review by this Court is clearly warranted.

I. LSA: R.S. 13:3105 is constitutionally infirm as it is written

Each citizen of the state of Louisiana is entitled to the same judicial process despite the parish where one resides. Each state should seek to provide a uniform authority in dealing with that process. The instant action addresses a political subdivision that has created boundaries in the judicial process with its exception under LSA-R.S. 13:3105. This excep-

tion is contrary to due process and creates law by trickery. To allow such differences between the parishes would ultimately require attorneys to be specifically licensed to practice in each parish such as we have between the states. This would limit the practice of law within the state due to the variations in the legal practice. To let such a statute stand creates boundaries that would unfairly limit one's right to counsel. We cannot have such balkanization of the rules of procedure where we have a uniform legal code.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups of persons. *Romer v. Evans,* 116 S.Ct. 1620, 1627 (1996) citing *Personnel Administrator of Mass. V. Feeney,* 442 U.S. 256, 271-272, 99 S.Ct. 2282, 2292, 60 L.Ed. 870 (1979). The *Romer* court further states that they have attempted to reconcile this principle with reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, they will uphold the legislation so long as **it bears a rational relation to some legitimate end.** *Heller v. Doe,* 509 U.S.__, 113 S.Ct. 2637, 2642-2643, 125 L.Ed.2d 257 (1993). *Id.* at 1627.(Emphasis added). The instant statute, R.S. 13:3105, distinguishes between litigants in Orleans Parish and litigants in other parishes of the State. As such, it subjects the Orleans Parish litigants to disadvantages to which other litigants are not similarly subjected. It is fundamentally unfair to do so, at least in the absence of any reasonable basis for the distinction.

The pertinent statutes in the instant action are as follows:

Fixing the bond; calling the jury venire

Except as otherwise provided by R.S. 13:3105 et seq., when the case has been set for trial, the court shall fix the amount of the bond to cover all costs related to the trial by jury and shall fix the time for filing the bond, which shall be no later than thirty days prior to trial.

LSA-C.C.P. Art. 1734. (Emphasis added).

Art. 1734.1. Cash deposit; procedure.

A. When the case has been set for trial, the court may order, in lieu of the bond required in Article 1734, a deposit for costs, which shall be a specific cash amount and the court shall fix a time for making the deposit, which **shall be no later than thirty days prior to trial.** The deposit shall include sufficient funds for payment of all costs associated with a jury trial, including juror fees and expenses and charges of the jury commission, clerk of court and sheriff. The required deposit shall not exceed three hundred dollars per day for each day the court estimates the trial will last. Notice of the fixing of the deposit shall be served on all parties. If the deposit is not timely made, any other party shall have an additional ten days to make the required deposit. Failure to post the cash deposit shall constitute a waiver of a trial by jury. However, no cash deposit shall be required of an applicant for a jury trial under the provisions of this Article if waived or an order is rendered, pursuant to Chapter 5 Title 1 of Book IX of the Code of Civil Procedure, permitting the applicant to litigate or continue to litigate without payment of costs in advance or furnishing security therefor.

LSA-C.C.P. Art. 1734.1 Amended by Acts 1995, No. 148' 1. (Emphasis added)

R.S. 13:3105. Compensation of Jurors in civil cases.

A. Those serving as jurors in the trial of civil cases triable by a jury in **the Civil District Court for the Parish of Orleans** shall be entitled to compensation of sixteen dollars each for each and every day, or part of a day, on which they serve as jurors in any civil case, the said sum total to be charged as costs and paid by the party cast for such costs. The party praying for the jury shall deposit with the clerk of the civil district court the sum of sixteen dollars as jury costs. In addition, **prior to the commencement of trial,** the party praying for the jury shall deposit in the registry of the court the sum of one hundred ninety two dollars for each day the court estimates the trial will last. No case triable by jury shall be placed on the court's jury trial docket and fixed for trial unless the sixteen dollar deposit is made. No such trial shall commence until the additional deposit provided herein is made.

LSA-R.S. 13:3105 (Emphasis added.)

The statutes dictate the time period which a litigant may post bond prior to trial. Under Art. 1734.1, a litigant must deposit its jury costs thirty days prior to trial. Under R.S. 13:3105, a litigant in Orleans Parish may pay its costs prior to the commencement of trial. With LSA-R.S. 13:3105, the legislature provided an exception for Orleans parish that was not provided to any other parish. R.S. 13:3105 creates a classification scheme under which persons similarly situated receive unequal treatment.

In *F.S. Royster Guano Co. V. Virginia,* 253 U.S. 412 (1920), the Court held that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike." In *New Orleans v. Duke,* 427 U.S. 297 (1976), the Court held that the equal protection clause is satisfied so long as the classification is "rationally related to a legitimate state interest." In *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), a Texas state statute did not survive low level scrutiny. The state of Texas sought to deny a permit for a home for the mentally retarded. This Court found that denying "the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."

> "The term "rational", of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational" — for me at least— includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially..."

In the instant case, there is no element of legitimacy or neutrality. There is no legitimate public purpose. Therefore, there is no rational basis for this distinction.

Under the U.S. Constitution, the legislature classification must be rationally related to a legitimate state purpose, a standard of review that is essentially the same as Louis-

iana's where no fundamental right or suspect class if involved. *Clements v. Fashing,* 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508, reh. den., 458 U.S. 1133, 103 S.CT. 20, 73 L.Ed.2d 1404 (1982); *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528, 93 S.CT. 2821, 37 L.Ed.2d 782 (1973).

As evident in the legislative history cited below, the aim of the legislature is to provide a uniform and comprehensive method or procedure for securing costs for jury trials for all actions in the state. However, LSA-R.S. 31:1305 is inconsistent with the legislature's aim. There is no logical reason for the difference in this procedure between the parishes. The closest parish to Orleans is Jefferson, which is less than ten miles from courthouse to courthouse. Because petitioners were in Orleans rather than Jefferson or St. Tammany, petitioners were deprived of their right to rely on the consistency of the law. Given the equities of the case and the legal arguments involved, a bench trial, a different trier of fact, would have substantially changed the outcome.

Trial by jury in civil trials, unlike the case in criminal trials, has not been deemed essential to due process. The Fourteenth Amendment has not been held to restrain the States in retaining or abolishing civil juries. Although Louisiana jurisprudence has classified the right of a litigant to a jury trial as fundamental, to declare this statute unconstitutional would not eliminate any fundamental right. An Orleans litigant would still have the right to a jury trial, however, to retain this right they would have to follow La. C.C.P.1734.1. This would insure uniformity in the state.

The statute will offend the equal protection safeguard "only if the classification rests on grounds wholly irrelevant

to the achievement of the State's objective", *McGowan v. Maryland,* 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961), or if the objective itself is beyond the State's power to achieve, *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). It is readily apparent that there is no purpose to La. R.S. 13:3105. In fact, it thwarts the purpose of La. C.C.P. Art. 1734.1 as it is in direct contravention to this statute and the purpose outlined by the legislature.

Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights' Part II, 1974 Duke L. 527, 534-540:

> There is a number of striking resemblance between the interests in voting and in litigating. Both the voting and litigating interests base a claim to fundamentality" on the idea that they are "preservative of all rights"; of both it can be said that "in social compact terms, in exchange for this legal and orderly method of resolving disputes, one restricts his power to satisfy his claims by force"; and that "ability to litigate just claims, like availability of franchise, gives legitimacy to the states' coercive power". Indeed, litigation and legislation are bound up with one another in an entire, political-legal order in which the court's part is no less critical than the legislature's. Access to courts and access to legislatures are thus claims that merge into one another, and you cannot, without confusion call a person a citizen and at the same time sanction his exclusion from that process."

Although Michelman is referring to the limitation due

to poverty on access to the courts, the same line of thinking can be followed in the instant case. In *Harper v. Virginia State Board of Elections* 383 U.S. 663 (1966), this Court extended the "fundamental interests" doctrine to all restrictions on voting whether or not they implicated the poor. The idea of "equal justice" should apply whether it involves the poverty or the residence of the litigant.

La.R.S. 13:3105 is not directed to an indentifiable legitimate purpose or a discreet objective. It is a residence-based classification undertaken for its own sake, something the Equal Protection Clause does not permit. *Romer v. Evans,* 116 S.Ct. 1620, 1623 (1996). Accordingly, review by this Court is clearly warranted.

ARTICLE 1734.1's LEGISLATIVE HISTORY REVEALS La. R.S. 13:3105 IS VAGUE AND AMBIGUOUS

A law that fails to define clearly the conduct it proscribes "may trap the innocent by not providing fair warning" and may in practical effect unpermissibly delegate "basis policy matters to policemen, judges and juries on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford,* 408 U.S. 104, 108-109 (1972). These concerns are present whenever a law is vague whether or not it touches on expression. Vague laws, like overbroad laws, may have a chilling effect and may invite selective enforcement. See Amsterdam, The Void for Vagueness doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). The lower court allowed a party to pay jury costs after the commencement of trial in

contravention of La. R.S. 13:3105's language "prior to the commencement of trial" and Art. 1734.1's language "thirty days prior to trial."). Such a selective enforcement has occurred in the instant case.

Art. 1734.1's gives no discretion to the trial court. Under Art. 1734.1 both parties forfeit jury trial rights thirty (30) days prior to trial. The legislature established express pre-trial steps to clarify pre-trial procedure and insure a fair adjudication of the issues. To allow La. R.S. 13:3105 to stand creates ambiguity in the law.

The legislative history of the Bill indicates its purpose was to reduce confusion in the Clerk's office. The legislative history of Louisiana Code of Civil Procedure Art. 1734.1 reveals that the cash deposit procedure, which was requested by the Police Jury Association of Louisiana, was in fact designed to benefit the clerks. *Dept. of Tansp. & Develop. v. Walker,* 658 So.2d. 190, 194 (1995).

> The version of the Senate bill Act 307 of 1989 provided only that the trial court should "fix the date" for the deposit, but did not limit the period within which the trial court might exercise its discretion. The aspect of the statute was amended in committee, and "within thirty days prior to trial" language was added:
>
> > Ms. Leah Guerry suggested that rather than an open-end time period, a thirty day period be set. The committee adopted an amendment, offered by Senator Ewing which specifies that the time set by the court for making the required deposit shall be within 30 days prior to trial.

Walker at p. 190 FN. 6 *citing* Committee Meeting Minutes, *Senate Comm. On Judiciary (B).* Senate Bill NO. 197, Pp. 5 (April 25, 1989).

Prior to the enactment of the cash deposit procedure, a bond put up by the moving party secured jury trial costs. However, with the bond deposit, the parish had to advance the money out of parish general funds. It was an indeterminable time before the parish received its money back; or the judgment of the trial courts is appealed. In the meantime some of the bonding companies went broke and the parish had to eat the bill. (Committee Meeting Minutes, House Judiciary Committee, House Bill No. 41, P.4 (May 18, 1987). Congress attempted numerous time to clarify this process and finally in the August, 1995 revision achieved its goal.

Louisiana Supreme Court has also strived to clarify this process.

> "On June 12, 1995, the Legislature approved House bill No. 882 amending LSA-C.C.P. Arts. 1734 and 1734.1 La. Acts. 1995, No. 148'1. ... While we acknowledge the **Legislature's decision to clarify the time limitations** set forth in LSA-C.C.P. Art. 1734.1, we emphasize that this legislative action, while it may be determinative in future cases, does not impact our decision in *this* case."

Walker at p. 198. FN.10. The Court attempts to follow the legislative intent of the statute.

The language of R.S. 13.3105 "prior to commencement to trial" not only creates a hardship on the clerks, it creates vagueness and ambiguity in the law. Despite Congress' at-

tempts to clarify the jury cost issue, Orleans parish has been left with an exception that disadvantages litigants and attorneys and thwarts the predicatability of the legal process. This statute should be stricken as unconstitutional.

CONCLUSION

The statute 13:3105 violates the Fourteenth Amendment to the United States Constitution in its vagueness and its exception to Orleans parish residents. This is an issue of public significance and, unless addressed by the United States Supreme Court will continue to recur with alarming frequency. Jury trial statutes must be uniform throughout the state in order for litigants to know their rights in the judicial process. R.S. 13:3105 must be stricken as contrary to both due process and equal protection.

Respectfully submitted:

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APPENDIX A

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER:89-15699 DIVISION "H" SECTION 12

SUZANNE ROSMAN, ET AL

VERSUS

GULF INDUSTRIES, INC., ET AL

FILED:_____ _____
DEPUTY CLERK

JUDGEMENT

This cause was duly tried before and submitted to the jury and the jury returned with responses on the 23rd day of April 1996, to the interrogatories submitted as follows:

INTERROGATORY NO. 1

Do you find that the plaintiffs, Suzanne Rosman, individually and on behalf of Sam Rosman's estate and her minor children, were injured or damaged as a result of the accident which occurred between Sam Rosman and the stake bodied truck being used in the road striping operation on or about March 17, 1987?

YES X NO_____

VERIFIED

If you answered "YES" to interrogatory No. 1, proceed to interrogatory No. 2. If you answered "NO" to interrogatory No. 1, it is not necessary to answer any further interrogatories. The jury foreperson must now sign and date this document in the space provided on Page 4, return it to the Court Crier, and return to the courtroom.

INTERROGATORY NO. 2

Do you find that the defendants, Gulf Industries, Inc. and Jack B. Harper Contractors, were negligent?

YES _____ NO X_____

If you answered "YES" to interrogatory No. 2, proceed to interrogatory No. 3. If you answered "NO" to interrogatory No. 2, it is not necessary to answer any further interrogatories. The jury foreperson must now sign and date this document in the space provided on page 4, return it to the Court Crier, and return to the courtroom.

The aforesaid responses to Jury interrogatories considered:

IT IS ORDERED, ADJUDGED AND DECREED that the said verdict be and is hereby accepted by the court and that there be judgment rendered herein in favor of the defendants, and against the plaintiffs, dismissing said suit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants are awarded all costs of these proceedings which amounts are to be established by separate motion, hearing and judgment.

New Orleans, Louisiana, this 25th day of April, 1996.

/s/ Michael Bagneris
JUDGE

HADAH/ZURICH/ROSMAN/JUDGMENT.FNL

APR 26 1996

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

SUZANNE B. ROSMAN, ET AL.	*	No. 96-CA-2610
VERSUS	*	COURT OF APPEAL
GULF INDUSTRIES, INC., HARPER CONSTRUCTION CORPORATION, JACK B. HARPER, ZURICH INSURANCE COMPANY, GENERAL STAR INSURANCE COMPANY AND ABC INSURANCE COMPANY	* * *	FOURTH CIRCUIT STATE OF LOUISIANA

* * * * * *

APPEAL FROM THE
CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS
NO. 89-15699, DIVISION "H"
HONORABLE MICHAEL G. BAGNERIS, JUDGE

* * * * * *

PHILIP C. CIACCIO
JUDGE

* * * * * *

(Court composed of Chief Judge Patrick M. Schott and Judge Philip C. Ciaccio and Judge Steven R. Plotkin)

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ATTORNEYS FOR APPELLEES

MAY 21 1997

AFFIRMED

Following a trial by jury in this tort suit, a verdict was rendered in favor of defendants. Plaintiffs appeal from the judgment of the trial court which adopts the jury verdict and dismisses plaintiffs' petition. For the reasons stated herein, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

This case arises out of an fatal automobile accident which occurred on I-10 in New Orleans. On May 17, 1989, at approximately 10:45 a.m. Sam Rosman was driving his vehicle eastbound on the I-10, and exited on the Carrollton Exit ramp. Approximately 600 feet from the beginning of this ramp, Rosman collided with a 1977 stake body truck which was owned by defendant, Gulf Industries, Inc. The stake body truck was the final vehicle in a moving caravan of road construction vehicles which were performing a paint-striping operation pursuant to a federal highway project involving the overlay of a portion of I-10 near the Carrollton interchange. Pursuant to this project, the State of Louisiana, Department of Transportation and Development, ("DOTD") hired Barriere Construction Company as general contractor to perform the construction work on the highway. In turn, Barriere contracted with Jack B. Harper Contractors, Inc. ("Harper") to perform the striping operations. Harper employed vehicles owned by Gulf Industries to execute the striping work, one of which was the stake body truck which was involved in this accident.

Following this accident, Samuel Rosman was

transported to Charity Hospital where he was pronounced dead at 11:06 a.m. He was survived by a wife, Suzanne Rosman, and three minor children. Mrs. Rosman, individually and on behalf of the minor children, subsequently filed this petition for damages for the wrongful death of Samuel Rosman. Named as defendants were the State of Louisiana through the DOTD, Barriere Construction Company, Jack B. Harper Contractors, Inc. and Gulf Industries, Inc. Prior to trial the plaintiffs settled their claims with the DOTD and Barriere, and proceeded to trial against Harper and Gulf Industries.

Following a six-day trial, the jury returned a verdict in favor of defendants. The jury verdict consisted of answers to two interrogatories: 1) Do you find that the plaintiffs, Suzanne Rosman, individually and on behalf of Sam Rosman's estate and her minor children, were injured or damaged as a result of the accident which occurred between Sam Rosman and the stake bodied truck being used in the road stripping operation on or about March 17, 1989?; and 2) Do you find that the defendants, Gulf Industries, Inc. and Jack B. Harper Contractors, were negligent? The jury answered the first interrogatory in the affirmative, but answered the second interrogatory in the negative, thus finding no liability on the part of defendants for plaintiffs' damages. The trial judge thereafter rendered judgment in favor of defendants, dismissing plaintiffs' petition. Plaintiffs filed a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial, both of which were denied by the trial court. Plaintiffs now appeal, urging the following assignments of error:

I. The trial court erred when it held that Gulf Industries was not negligent.

II. The trial court erred in allowing Irene Ludwig, M.D. to testify at trial.

III. The trial court erred in not dismissing the jury.

STANDARD OF REVIEW

In *Rosell v. ESCO,* 549 So.2d 840 (La. 1989), the Supreme Court clearly stated the standard of review from a decision of the trial court:

> It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. The appellate review of fact is not completed by reading only so much of the record as will reveal a reasonable factual basis for the finding in the trial court, but if the trial court or jury findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. In applying the manifestly erroneous-clearly wrong standard to the findings below, appellate courts must constantly have in mind that their initial review function is not to decide factual issues

> *de novo*. When findings are based on determinations regarding the credibility of witnesses, the manifest error-clearly wrong standard demands great deference to the trier of fact's findings' for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said.
>
> *Rosell*, 549 So.2d at 844 (citations omitted.) *See also Stobart v. State Through DOTD*, 617 So.2d 880, 882 (La. 1993).

Under our state's appellate review standard, which is based on constitutional and jurisprudential principles, we are bound to affirm a trial court's decision absent an error of law or a factual finding which is manifestly erroneous or clearly wrong. Although deference to the factfinder must be accorded, we nevertheless have a constitional duty to review the facts. After carefully considering the voluminous record and series of exhibits in their entirety, we conclude that the determination of the jury that defendants were not negligent was not clearly wrong or manifestly erroneous. We therefore affirm the trial court's judgment.

ANALYSIS

Louisiana jurisprudence indicates that in a tort action the courts are to apply a "duty-risk" analysis to determine whether a defendant's conduct was the legal cause of the plaintiff's injury. *Hill v. Lundin & Associates, Inc.*, 260 La. 542, 256 So.2d 620 (1972). Under the duty-risk method, there are usually the following inquiries: (1) What, if any, duty was owed by the defendant to plaintiff? (2) Was there a breach

of the duty? (3) Was that breach a substantial cause in fact of the injury? (4) Was the risk and harm within the scope and protection afforded by the duty breached? Whether a defendant owes a plaintiff a legal duty is a question of law. Whether a defendant has breached a duty owed is a question of fact. *Annis v. Shapiro,* 517 So.2d 1237 (La. App. 4th Cir. 1987).

Defendants' Duty

We must first determine what, if any, duty is owed by defendants to plaintiffs' decedent, Samuel Rosman. Louisiana jurisprudence provides that a contractor on a public highway has a duty to protect motorists from harm. "It is the duty of one doing construction work to properly label, mark or barricade places in the construction site that present an unreasonable risk of harm to those in the area." *Carr v. Boh Bros. Const. Co., Inc.,* 557 So.2d 356 (La. App. 4th Cir. 1990) *writs denied,* 559 So.2d 135 (La. 1990). Further, Harper and Gulf Industries contractually assumed the duty to keep the highway in such condition so the public could travel the road in safety. The Louisiana Standard Specifications for Roads and Bridges (1982) (the Gold Book) was incorporated into the construction contract. Section 107.07 of the Gold Book provides:

> **PUBLIC CONVENIENCE AND SAFETY.** The contractor shall so conduct his work as to assure the least possible obstruction to traffic.
>
> When the highway under construction is to be kept open for traffic, the subgrade and surfacing shall be kept reasonably free from dust and in such condi-

> tion that the public can travel the road in safety. Safety and convenience of the general public and the residents along the highway, and protection of persons and property, shall be a primary responsibility of the contractor.

Defendants Harper and Gulf Industries, as contractors of the striping operation on this public highway, therefore, had the duty and primary responsibility to keep the roadway in such a condition such that the public could travel the road in safety. Defendant's duty extends to not only prudent, attentive drivers but to those who are momentarily inattentive or careless. *Burge v. City of Hammond,* 494 So.2d 539 (La. 1986).

Breach of Duty

Having determined the extent of defendants' duty in this case, our next inquiry must be whether the duty was breached. The jury, in failing to find defendants negligent in this accident, evidently made a factual determination that defendants did not breach their duty to the decedent. Samuel Rosman.

On appeal, plaintiffs contend that defendants breached their duty to Samuel Rosman by failing to adhere to the provisions contained in the original plans and construction contract. Plaintiffs offered into evidence the Plans & Specifications provided by the State in accordance with the federal highway project, along with the original contract entered into by the State, DOTD and Barriere Construction Company. Also offered into evidence was the subcontract between Barriere Construction and Jack B. Harper for the strip-

ing operation, which referred to the original contract between Barriere and the DOTD.

Plaintiffs' expert, Mr. Jarvis Michie, who was qualified by the court in accident reconstruction and highway safety, testified that both the Gold Book and the project plans contained specific directives which were not adhered to in this case. Plaintiffs allege that these acts of omission by the contractors constituted negligence and were the legal cause of decedent's harm.

First, plaintiffs contend that the signs placed on the highway to warn motorists of the construction work were insufficient. The record shows that at the time of the accident, there were approximately fifteen signs placed on the highway within one mile of the accident site which indicated the presence of construction in the area. According to the police officer who investigated this accident, the signs were triangular signs which were orange in color, some of which were equipped with orange flags on top. These signs were general construction signs which indicated that a motorist was entering a construction area. Photographs of the accident scene indicate that the signs stated generally the term "under construction." There was also evidence that two "speed zone" signs were located in the area, advising motorists to reduce their speed.

Plaintiffs' expert in highway safety, Jarvis Michie, testified that the plans provided by the State of Louisiana required that the signs contain more particular information of the type of work occuring at the time. Specifically, Mr. Michie opined that the signs should state that within a specified number of feet, the lane would be closed or that there

would be a one-lane road ahead. Further, plaintiffs contend that the signs were conflicting and failed to give motorists an accurate warning of the work that was being done. Mr. Michie testified at trial that there was a merging traffic sign in the exit ramp at the time of the accident which indicated to motorists that they should remain in the left lane of the exit ramp. He stated that because the striping operation was occurring in the left lane, this sign conflicted with the construction signs and should have been covered.

However, the jury apparently failed to credit the testimony of plaintiffs' expert that the signage on the exit ramp constituted a breach of duty by defendants. We find this factual determination to be supported by the record. Although plaintiff contended that the plans provided by the State required more specific signage, the record indicates that these provisions applied specifically to the asphalt overlay project conducted by Barrier Construction Company. There were no specific directives contained in the plans for traffic control which applied directly to Jack Harper who was performing the striping operations. Further, there was testimony in the record by Dr. Robert Erlich, defendants' accident reconstruction expert, that the signs were sufficient to communicate the appropriate message to motorists. The jury evidently chose to accept the testimony of Dr. Erlich over that of Mr. Michie, and we find no manifest error in the jury's factual determination.

Plaintiffs also contend that the project plans called for lane closure of the accident site while the construction work was in progress. Mr. Michie testified that the plans and specifications made reference to the methods to be employed in lane closure, i.e., employing cones and signage and possibly

flagmen to indicate the closing of the lane. Mr. Michie opined that defendants breached their duty by failing to close the traffic lane during the progress of the paint striping operation. However, our review of the contract and the plans and specifications fail to indicate a specific requirement that the lane be closed *during paint striping operations.* The reference to lane closures in the plan refers generally to the asphalt overlay project which was conducted by Barriere Construction. The pages of the plans which deal with pavement markings or stripings contain no reference to lane closure. Further, defendants' expert Dr. Erlich testified that cones and lane closures are not generally used in a moving construction operation. The jury apparently chose to credit the testimony of defendants' expert over plaintiffs' expert and based on the record before us, we find no manifest error in this determination.

Next, plaintiffs contend that the arrowboard used during the paint striping operation was not the type specified in the construction contract and, therefore, plaintiffs argue that defendants breached their duty to protect approaching motorists. Plaintiffs asserted at trial that the arrowboard as it existed at the time of the accident provided insufficient warning to Samuel Rosman of the presence of slow moving construction vehicles on the roadway.[1]

The Special Provisions section of the construction con-

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[1] Although plaintiffs imply that the arrowboard may not have been functioning at the time of the accident, there is testimony in the record that it was working prior to the accident, but that the wiring became loose as a result of the impact. The jury made a reasonable inference based on testimony in the record that the arrowboard was lit at the time of the accident, and we will not disturb this determination.

tract provides as follows:

> The contractor shall furnish and satisfactorily maintain flashing arrow sign panels for temporary traffic control at locations shown on the plans or as directed.
>
> Plans shall be of the specified types conforming to the following requirements; if no type is specified. Type C panels shall be furnished.

Panel Type	Minimum Size	Minimum Number of Panel Lamps
A	24" X 28"	12
B	30" X 60"	13
C	48" X 96"	15

Jarvis Michie, plaintiff's expert in highway safety, testified that the arrowboard on the back of the stake body truck which was involved in this accident contained 12 lamps, and was therefore a Type A arrowboard. As the contract required a Type C arrowboard, Michie contends that the arrowboard did not meet the requirements of the contract. Plaintiffs contend therefore that the arrowboard was insufficient and the failure to adhere to the contract constituted negligence by defendants.

With regard to the arrowboard, the plans and specifications provided by the State for this project did not contain a specific requirement to use an arrowboard during the paint striping operations. However, the record indicates that there were two arrowboards in use at the time of the accident. One arrowboard was a Type C and was placed on a "kettle truck"

which was in the mid-portion of the moving train operation. The second arrowboard which is the subject of this dispute was on the "shadow vehicle" or the final truck in this caravan. There is evidence in the record that the second arrowboard was larger in size than a Type C arrowboard, and although this panel contained only 12 lamps, the lamps were significantly larger and more intense than the lamps in a traditional Type C arrowboard. Defendants' expert, Dr. Erlich, testified that the arrowboard used by defendants was sufficient to warn approaching motorists.

In addition, the record shows that two inspectors who were employed by the State were present in the moving striping operation. The State inspectors had the function of supervising the work being performed and insuring the work met the contractual specifications. Both inspectors testified at trial that they examined the arrowboards prior to the accident and determined that they were in working order and conveyed the intended message. The inspectors determined that the arrowboard was visible from an adequate distance to give motorists advance warning of the construction work. The State inspectors therefore approved the use of the arrowboards in the paint striping operation.

In determining that defendants were not negligent, the jury apparently rejected the testimony of Mr. Michie that the arrowboard used by defendants was insufficient and in violation of the contract. Further, the jury evidently interpreted the language of the contract and determined that the State inspectors did not alter the terms of the contract in accepting the defendants' arrowboard. The jury apparently chose to credit the testimony of Dr.Erlich and the State inspectors who stated the arrowboard was sufficient and not in viola-

tion of the contractual provisions. It was the function of the jury to listen to the testimony of the witnesses and to review the documentary evidence presented. Based on the record before us, we are unable to conclude that the jury's factual determination was manifestly erroneous.

Plaintiffs next contend that the type of stake body truck used by defendants in this moving train operation caused the harm suffered by Samuel Rosman, i.e., his death. Plaintiffs allege that based on the position of the truck bed on this vehicle, the rear of the truck invaded Mr. Rosman's vehicle and caused fatal injuries. Plaintiffs allege that if the Rosman vehicle had collided with a vehicle with a standard bumper, Mr. Rosman could have survived the accident. Plaintiffs allege that defendants were aware that the final vehicle in the moving caravan could be hit by approaching vehicles, and they were therefore negligent in using this type of truck as a shadow vehicle.

In support of this position, plaintiffs rely on the testimony of Jarvis Michie who stated that if the Rosman vehicle had struck a shadow vehicle with a standard bumper, Mr. Rosman could have survived the accident, assuming he was driving at a speed of 30 m.p.h.

However, the jury apparently failed to credit the testimony of Mr. Michie on this issue. First, other than the testimony of Mr. Michie, there was no evidence presented that the bumper on the stake body truck was in violation of any industry standards. In fact, Dr. Erlich testified that the bumper on the truck was the standard bumper for that type of vehicle, and was equipped with an underride protector based on federal regulations. Dr. Erlich testified that the

the size and height of the truck met industry specifications.

Second, although Mr. Michie opined that Mr. Rosman would have survived the accident if he collided with a truck with a standard bumper while travelling 30 m.p.h., the evidence in the record indicates that Mr. Rosman was travelling in excess of 30 m.p.h. A witness to the accident, Cynthis Curran, testified that Mr Rosman was travelling in excess of her speed, which she estimated to be 35 - 40 m.p.h. Further, a second eyewitness to the accident, Thaddeus Plummer told police investigators that the Rosman vehicle was travelling approximately 50 - 55 m.p.h.

The jury apparently chose to credit the testimony of Dr. Erlich over that of Mr. Michie, and the jury apparently believed Mrs. Curran's testimony that the Rosman vehicle was traveling in excess of 30 m.p.h. These findings are well-supported by the record, and under these circumstances, we are unable to find that the jury's factual determinations were manifestly erroneous.

Plaintiffs also contend that the defendants marketed a device which would have prevented Mr. Rosman's death, even if he had collided with the truck as he did. Defendants were the distributors of a product called a "truck mounted attentuator," or "TMA." This device is designed to be used on shadow vehicles or barrier vehicles that are located in vulnerable positions in construction work zones. According to Mr. Michie, who was the author of a treatise which set the standards for the TMA, the purpose of this device is to protect the highway workers in a slow moving operation from an oncoming vehicle and also to reduce the severity of harm to a motorist involved in a collision. Mr. Michie opined that

if a TMA had been present on the shadow vehicle in this accident, the device would have "slowed the Rosman vehicle, and he would have not been subjected to any risk or harm."

In determining that defendants were not negligent for the death of Samuel Rosman, the jury apparently concluded that the failure of defendants to use a vehicle equipped with a TMA in their paint striping operations did not constitute negligence. In light of the evidence presented, we do not find this determination to be unreasonable. First, there was no evidence introduced that the standards in the industry required defendants to use a shadow vehicle equipped with a TMA. In fact, Mr. Michie testified on cross-examination that in 1989 when the accident occurred, there was no requirement in the law that a TMA be used on a shadow vehicle. Further, Dr. Erlich testified that the lack of a TMA did not cause Mr. Rosman's accident, and that the presence of a TMA would not have prevented the harm.

The jury apparently rejected the testimony of Jarvis Michie that defendants were required to equip their vehicle with a TMA and their failure to do so constituted negligence. The jury apparently accepted the testimony of Dr. Erlich that a TMA was not required and would not have prevented the harm. It was the function of the jury to listen to the testimony of the witnesses and to evaluate their demeanor. The record fails to contain sufficient competent credible evidence that the absence of a TMA on the shadow vehicle in this case caused the death of Samuel Rosman. Under the circumstances presented here, we fail to find that the jury's determination in this regard to be manifestly erroneous.

Comparative Fault

Plaintiffs next contend that the jury erred in failing to apply the principles of comparative fault to this accident. Comparative fault principles as enunciated in article 2323 of the Louisiana Civil Code apply only when "a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons. . . ." The jury in this case found no negligence on the part of defendants for this accident, and we have found no manifest error in this determination. There has been no determination that Samuel Rosman's death was the result of "the fault of another person or persons." Consequently, the principles of comparative negligence are not applicable to the present situation. Plaintiffs' argument is without merit.

The record in this case contains substantial evidence that Samuel Rosman was inattentive to the roadway at the time of the accident. A witness to the accident, Mrs. Cynthia Curran, testified by video deposition that she saw the Rosman vehicle travelling ahead of her in the left lane of traffic on the Carrollton exit ramp. When Mrs. Curran observed the large truck and workmen in the left lane of traffic, she moved to the right lane and waited for the Rosman vehicle to move in front of her to the right lane. However, Ms. Curren testified that Mr. Rosman was looking down at his passenger seat and did not attempt to move to the right lane. She stated his car appeared to be drifting slightly to the right. She further stated that he made no evasive action to avoid the accident.

Another witness to the accident, Thaddeus Plummer, testified at the trial. Mr. Plummer stated he was sitting on

a porch of a house immediately adjacent to the Carrollton exit ramp, and observed the Rosman vehicle exit from the interstate. Mr. Plummer stated he saw the driver of the vehicle looking down and look up again, and then try to take evasive action. However, during his deposition, Mr. Plummer stated that the driver was looking down, and Mr. Plummer believed he "must be crazy or blind."

Further, there is evidence in the record that Mr. Rosman was using his cellular phone at the time of the accident, and that he had made several phone calls in the minutes before the accident. Emergency workers who removed Mr. Rosman from the car observed an open appointment book on the passenger seat of the Rosman vehicle and the telephone removed from its cradle.

Under the circumstances presented here, we find sufficient evidence in the record for the jury to conclude that the accident in this case was caused by the negligence of Samuel Rosman. Dr. Erlich testified that in his opinion, the accident was caused by the inattentiveness of the driver. Although this negligence would not have been a complete bar to recovery had defendants been found negligent, in the present case, there was no determination of negligence on the part of defendants, and the doctrine of comparative negligence thus does not apply.

Expert Testimony

Plaintiffs next contend that the trial court erred in allowing the expert testimony of Dr. Irene Ludwig. At trial, defendants offered the testimony of Dr. Ludwig, who was qualified as an expert in ophthalmology. She specializes in

the field of strabismus, or the abnormality of alignment of the eyes. There was evidence presented at trial that Mr. Rosman suffered from a condition in this left eye known as amblyopia. During the trial, the court held an in limine hearing outside the presence of the jury wherein Dr. Ludwig stated her opinion that based on the condition of Mr. Rosman's left eye, and based on the testimony of an eyewitness that he was looking down and to the right prior to the accident, she believed that Mr. Rosman "mislocalized" the position of the stake body truck. Plaintiffs objected to the introduction of Dr. Ludwig's testimony on the basis that the mislocalization theory was an untested scientific theory. After listening to the plaintiffs' expert in this field, Dr. Keith Morgan, who stated that mislocalization does not occur in someone with Mr. Rosman's eye condition, the trial court overruled plaintiffs' objection and allowed the testimony of Dr. Ludwig.

On appeal, plaintiffs allege that the trial court erred in allowing this testimony to be presented to the jury. La. C.E. art. 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Plaintiffs claim that Dr. Ludwig's testimony is "junk science" and does not meet the requirements of Daubert v. Merrill-Dow Pharnaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993). The court in *Daubert* set up four factors which would elimate unreliable expert testimony.

However, trial judges are generally given wide discretion in determining the qualifications of experts and the effect and weight to be given expert testimony. Absent a clear abuse of the trial court's discretion in accepting a witness as an expert, an appellate court will not reject the testimony of an expert. *State v. Stringer,* 567 So.2d 758, 761 (La. App. 2nd Cir. 1990).

The trial court, in admitting Dr. Judwig's testimony determined that mislocalization is not a theory that was new or novel, and whether the theory applied to the facts of the present accident would be a question for the jury. We have reviewed the standard set forth in *Daubert,* and we are unable to find that the trial court abused its discretion in allowing this testimony. We find the testimony of Dr. Ludwig concerning Mr. Rosman's eyesight to be relevant and material to the issues of this case. Although the jury was allowed to hear Dr. Ludwig's opinion that the concept of mislocalization applied in this case, the plaintiffs offered their own expert testimony by Dr. Morgan and Dr. Fitzmorris, Mr. Rosman's treating physician, that Mr. Rosman's eye condition did not cause him to misjudge the location of the defendants' truck. It was the function of the jury to assess the credibility of the witnesses and to weigh the evidence. Based on the verdict reached by the jury, we are unable to determine whether the jury chose to credit Dr. Ludwig's testimony. As the jury found no negligence on the part of defendants, it was not necessary to reach the issue of decedent's fault in this accident.

Under the circumstances presented here, we are unable to conclude that the trial court abused its discretion in permitting the testimony of Dr. Irene Ludwig. We do not find

that plaintiffs suffered any prejudice by the presentation of this evidence, and we will not reject the testimony of this expert.

Jury Trial

In their final assignment of error, plaintiffs contend that the trial court erred in permitting this case to be heard by a jury. In plaintiffs' original petition filed in July of 1989, plaintiffs requested a trial by jury. In their answer to this petition filed in September of 1989, defendants also requested a trail by jury. Prior to trial, the parties filed proposed jury interrogatories and proposed jury instructions. In the pre-trial order signed by all parties, the parties agreed that the case was to be tried by a jury. Plaintiffs at no time prior to commencement of the jury selection advised the court that they were waiving their request for a jury trial.

On the first day of trial, April 15, 1996, the jury pool was brought in and the parties selected a jury. Following jury selection, the court recessed. The following day, April 16, 1996, both plaintiffs and defendants made oral arguments and the plaintiffs called their first witness. Thereafter, plaintiffs moved to dismiss the jury which had been impaneled and sworn based on plaintiffs' failure to pay the costs of the jury. The trial court asked the defendants if they still wished to exercise their right to a jury trial, and defendants paid the costs of the jury. The trial court therefore denied plaintiffs' motion to strike the jury.

Plaintiffs subsequently sought emergency relief of this ruling in this Court. This Court stayed the proceedings, and on April 17, 1996 rendered the following disposition:

Writ granted: relief denied

We find no error in the trial court's ruling granting a jury trial to the defendant under the circumstances presented by this case.

Rosman v. Gulf Industries, Inc., 96-C-0882 (La. App.4 Cir. 4/17/96).

On appeal, plaintiffs contend that the trial court erred in allowing defendants to pay the costs of the jury after the commencement of the jury trial. In support of this position, plaintiffs rely on the Supreme Court decision of *Dept. of Transp. & Develop. v. Walker,* 658 So.2d 190 (La. 1995) and on La. C.C.P. article 1734.1 which requires a cash deposit prior to the commencement of a jury trial.

However, this assignment was fully considered and rejected on writ application by a panel of this Court. Consequently, this Court's decision became the law of the case.

In *Stroik v. Ponseti,* 96-842, 96-1500, (La. App. 4 Cir. 11/6/96) 683 So.2d 1342, 1348, *writ granted,* 96-2897, (La. 2/7/97) 688 So.2d 483, this Court held that under the law of the case doctrine, an appellate court generally may not reconsider its prior rulings when the case returns on direct appeal. In some rare cases an appellate court may, in its discretion, review an earlier decision, but such review is justified only in cases of palpable error or where application of the doctrine causes manifest injustice. *Id.*

Under the factual circumstances of the present case, the merits of plaintiffs' motion to strike the jury were fairly presented in plaintiffs' application for supervisory writs, and

this Court's denial of relief in that case is considered to be the law of the case. We will therefore not permit this issue to be relitigated at this point. This is not a case where our decision causes manifest injustice. The right to a jury trial is a fundamental right which was not waived by defendants at any time, and we find it more likely that manifest injustice would result were this Court to determine that defendants were not entitled to a jury trial.

CONCLUSION

After a complete review of the record in this case, we conclude that the jury's determination that defendants were not negligent in this tragic automobile accident was not clearly wrong or manifestly erroneous. Accordingly, the judgment of the trial court rendered in favor of defendants Jack B. Harper Contractors, Inc. and Gulf Industries, Inc. and against plaintiffs, Suzanne Rosman, et al, dismissing their petition, is affirmed. Each party shall bear its own costs of this appeal.

AFFIRMED

APPENDIX C

SUZANNE B. ROSMAN, ET AL.	*	No. 96-CA-2610
VERSUS	*	COURT OF APPEAL
GULF INDUSTRIES, INC., HARPER CONSTRUCTION CORPORATION, JACK B. HARPER, ZURICH INSURANCE COMPANY, GENERAL STAR INSURANCE COMPANY AND ABC INSURANCE COMPANY	* * *	FOURTH CIRCUIT STATE OF LOUISIANA

* * * * * *

ON APPLICATION FOR REHEARING

AUG 29 1997

PER CURIAM

Appellant contends on application for rehearing that this Court in its original opinion erroneously applied the "law of the case" doctrine as the earlier disposition on supervisory review conflicts with La. C.C.P. art. 1734.1. That statute requires that jury deposits be paid no later than 30 days prior to trial upon penalty of waiver of jury trial and has been strictly construed. *Blanchet v. Miller,* 689 So.2d 486 (La. App.

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COURT OF APPEAL FOURTH CIRCUIT

3 Cir. 1996). However, the provisions of La. C.C.P. art. 1734.1 do not apply to a jury trial in Civil District Court in Orleans Parish where this trial was held. Jury trials in Civil District Court are controlled by LSA-R.S. 13:3105, which constitutes an exception to the strict requirements of article 1734.1 as amended.

LSA-R.S. 13:3105 requires a party seeking a jury trial in Civil District Court to initially deposit $16.00, and then to deposit, "before the trial begins," $192.00 for every day the trial is expected to last. We find that the trial court was within its discretion in allowing the jury trial to proceed in this case where the jury deposit was made on the first day of trial. Accordingly, our original opinion which affirms the jury trial remains the same. In all other respects, the application for rehearing is denied.

APPENDIX D
THE SUPREME COURT OF THE STATE OF LOUISIANA

SUZANNE B. ROSMAN, ET AL

VS. NO. 97-C - 2421

GULF INDUSTRIES, INC., HARPER CONSTRUCTION CORPORATION, JACK B. HARPER, ZURICH INSURANCE COMPANY, GENERAL STAR INSURANCE COMPANY AND ABC INSURANCE COMPANY

IN RE: Rosman, Suzanne B.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Orleans Civil District Court Div. "H" Number 89-15699; to the Court of Appeal, Fourth Circuit, Number 96CA-2610

December 12, 1997

Denied.

HTL

PFC

WFM

BJJ

JPV

CDT

JTK

KIMBALL, J. not on panel.

Supreme Court of Louisiana
December 12, 1997

/s/ Illegible

Clerk of Court
For the Court